Jurisdiction

Judgment, dated March 23, 1961, was entered in the United States Court of Appeals for the Second Circuit on March 23, 1961.

Jurisdiction to review the Judgment by Writ of Certiorari is found in 28 U. S. C. A. 1254(1), 28 U. S. C. A. 2101 (c) and Rule 19(1b) of the Rules of this Court under this Court's power of supervision over the Federal Judicial System, and more particularly that the United States Court of Appeals for the Second Circuit (1) has decided an important question of federal law which has not been, but should be, settled by this Court and also (2) has decided a federal question in a way in conflict with applicable decisions of this Court; and (3) has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The jurisdictional basis of the District Court is founded on the Tucker Act, 28 U. S. C. A. 1346(a)(2), Quiet Title Statute, 28 U. S. C. A. 2410, Postal Service Statute, 28 U. S. C. A. 1339 and Due Process provision, 5th Amendment, United States Constitution.

Questions Presented

Petitioners respectfully pray that a Writ of Certiorari be granted and that this Honorable Court summarily reverse the court below. Questions presented for review are:

I

Did the Postmaster General have authority, under the Post Office Department Financial Control Act of 1950, 64 Stat. 462, Sec. 8(1), to enter into an agreement with the

owner of real property (1) to erect a post office building for the Post Office Department on that property and (2) to lease the building from the owner for a 20-year term for Post Office Department use on completion of the building, in view of the Public Contracts Act of 1906, 34 Stat. 255, 41 U. S. C. 11 (1958), which prohibits any government contract unless authorized by statute?

II

Did the Court of Appeals and the District Court depart from judicial principle and violate the well-established rule of this Court enunciated in *Chase* v. *United States*, 155 U. S. 489, voiding post office leases *ab initio* when not made in compliance with Public Contracts Act of 1906, 34 Stat. 255, 41 U. S. C. 11 (1958)?

III

Did the Court of Appeals and the District Court depart from judicial principle and violate the well-established rule of this Court enunciated in *Guerini Stone Co.* v. *P. J. Carlin Co.*, 240 U. S. 264, relating to construction of contracts by reference, annexation and merger of contract instruments in ignoring the existence of the January 1953 build-and-lease agreement and deciding this case only on the basis of the January 1954 lease instrument made pursuant to the January 1953 agreement in issue?

The Statutes

The statutes which the case involves are set forth:

1. Public Contracts Act of 1906, 34 Stat. 255, 41 U. S. C. 11 (1958).

> "No contract or purchase on behalf of the United States shall be made, unless the same is authorized by

law or is under an appropriation adequate to its fulfillment, except in the Departments of the Army, Navy and Air Force, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

2. Post Office Department Financial Control Act of 1950, 64 Stat. 462, Sec. 8.

"In the performance of, and with respect to, the functions, powers, and duties vested in him, the Postmaster General may—"

(1) enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate, without regard to the provisions of any law, except those provisions of law specifically applicable to the Department;

(2) • • •;

(3) • • •."

3. Post Office Department Property Act of 1954, 68 Stat. 523, Sec. 203(a).

"The Postmaster General is authorized to—

(1) negotiate and enter into lease agreements with any person, copartnership, corporation, or other public or private entity, which do not bind the government for periods exceeding thirty years for each such lease agreement, on such terms as the Postmaster General deems to be in the best interests of the United States, for the erection by such lessor of such buildings and improvements for postal purposes as the Postmaster General deems appropriate, on such lands sold, leased

or otherwise disposed of by the Postmaster General to, or otherwise acquired by, such person, copartnership, corporation, or public or private entity;

(2) • • •.

203(b) • • •."

Statement of the Case

In January 1953, the subject premises was a vacant parcel of land owned by Cohanan Realty Corp. That lessor at that time entered into a construction and leasing agreement with the Post Office Department for erection of a permanent-type structure on that parcel for postal purposes in accordance with Post Office Department specifications and requirements and on completion for the execution of a lease instrument for 20-year term.

The agreement stipulated the specifications of the structure to be erected and the rental, duration of the term (20 years), terms and conditions of the lease were stated in the agreement, and the standard form of Post Office Department lease attached to the agreement.

In January 1954, on completion of the building, the previously agreed to lease instrument was executed between the Post Office Department and the five individuals on the lease instrument as successors in interest to Cohanan Realty Corp. for 20-year term.

This is indicated in Provision 13 of the lease instrument which states that it is made pursuant to the January 1953 construction and leasing agreement.

In April 1955 petitioners became the owners of the subject property and are presently the owners thereof.

In July 1960, quiet title suit was instituted to annul the lease instrument as void and invalid and to remove it from

the records against the property. The complaint alleged that the January 1953 build-and-lease agreement for 20-year term and the January 1954 20-year term lease instrument made pursuant to the January 1953 agreement are void and invalid because in violation of 41 U. S. C. 11 (1958) which prohibits such agreements unless authorized by law. That the subject contract was first authorized by the Post Office Department Property Act of 1954 on July 22, 1954 under 68 Stat. 523, Sec. 203(a)(1).

That the existence of a void and invalid lease made without authority of law and filed against the property of the petitioners violates their property rights without due process under the Fifth Amendment of the United States Constitution.

Reasons for allowance of the writ and for summary reversal

POINT I

Post Office Department Financial Control Act of 1950, 64 Stat. 462, Sec. 8(1), does not authorize erection of post office buildings and 20-year leases on such buildings. It is merely a Congressional authorization to the Postmaster General to waive the general statutes governing government leases as applied to the Post Office Department.

From a reading of the 1950 statute, it is clear that the words of the statute do not speak of authority to the Postmaster General to enter into an agreement with the owner of real property for such owner to build a post office on his property for the Post Office Department in accordance with Post Office Department specifications and requirements, and on completion to execute a 20-year lease on the newly

erected building for Post Office Department use. This was done under a later statute of July 22, 1954 Post Office Department Property Act, 68 Stat. 523, Sec. 203(a)(1).

Comparison of the words and purpose of the two statutes and the legislative history shows clearly that the decision of both courts below was in error. Neither the erection of new Post Office buildings nor 20-year leases is authorized under this statute, 64 Stat. 462, Sec. 8(1).

For comparison see 39 U. S. C., Secs. 2102, 2103 as to duration of term of lease on build-and-lease agreements reported in U. S. Code Congressional and Administrative News, 86th Congress, 2nd Session, 1960, Vol. 1, Page 675.

The legislative history of the 1950 statute indicates that the Postmaster General desired only authority to waive the general statutes regarding advertising, competitive bids and other requirements in order to be free to negotiate directly with chosen lessors selected by the Post Office Department. Elimination of these requirements would result in improved financial and accounting procedures in accordance with the 1950 statute enacted for that purpose.

U. S. Code Congressional Service, 81st Congress, 2nd Session, 1950, Vol. 2, Page 3024:

"The proposed legislation will modernize and improve the accounting and auditing of the Post Office Department and implement the Department's new budget procedure. To implement the necessary changes in functions and procedures and to give needed freedom of action to the Department, the bill provides the following: * * * (11) Removes certain restrictions with regard to leases of real property; and (12) * * *."

Page 3028: "Section-by-Section Analysis. * * * Section 8. Leases, donations, and rewards. This section gives the Postmaster General additional authority and freedom of

action with respect to the leases of real property. • • • With respect to the authority in this section concerning leases, the Postmaster General is authorized to enter into leases of real property necessary in the conduct of the Department's affairs, without regard to the provisions of laws other than those specifically applicable to the Department. General provisions of law regulating the rent payable under Government leases, general provisions requiring advertising, etc., will not apply to such transactions. It is recognized that post offices must be located to meet the needs of the public, the handling of the mail matter, and to permit economical operations of the Department, *and that the statutes waived* give rise to frequent difficulties in this respect." (Emphasis added.)

The following excerpts of testimony on the subject legislation further reinforce and support this view.

Page 74:

"That, taken together with the provisions of section (3a), which permits the Postmaster General, notwithstanding the provisions of any other law, to enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of the affairs of the Department, and on such terms as he may deem appropriate, would permit the Postmaster General to waive any and all provisions of law heretofore enacted with respect to the Government generally or with respect to the Post Office Department, telling it how it should enter into its contracts, telling it how it should make its disbursements.

All of these could be waived if the Postmaster General determined that—it was in the performance of and with respect to the functions, powers, and duties vested by law in him or any other officer in or under the Post Office Department." (Emphasis added.)

Page 85:

"• • • *I think the Postmaster General comes in this morning and agrees that he is asking for authority to waive these numerous statutes which have been enacted from time to time by Congress to tell the Department how it is to spend its money; in other words, whether it has to advertise, and so forth.* • • • (Emphasis added.)

We feel, in any event it would be much better to legislate specifically with reference to the Post Office Department, to give them the freedom they need on their leases • • •."

Bills To Implement Recommendations Of The Commission On Organization Of The Executive Branch Of The Government (The Hoover Commission),

Hearings before the Committee on Post Office and Civil Service, United States Senate, Eighty-first Congress, 1st and 2nd Sessions,

On S. 2027, S. 2062, S. 2111, S. 2212, S. 2213, S. 2509, S. 3829 and S. 3830, July 20, 27, 1949 and March 1, 14, 21, June 29, July 18, 27 and August 7, 1950.

The Post Office Department Financial Control Act of 1950 is a statute, as stated in the purpose of the act, for the improvement of Post Office Department accounting methods and procedures.

Section 8(1) of the statute, 64 Stat. 462, is clearly a Congressional authorization to the Postmaster General (for the improvement of accounting procedures) to waive existing general statutes on Government leases and their requirements when in the exercise of his duties and authority he does enter into leases of real property based on Title 39, U. S. C., Postal Service Act or some other specific law

for postal purposes (See supra, page 74—"All of these could be waived etc.").

The section itself, being only a waiver of the general laws, does not authorize build-and-lease agreements for 20-year term as claimed by the Government. This was not even claimed at the time of enactment, by the Postmaster General, the Comptroller General of the United States, the Director of the Bureau of the Budget or the Secretary of the Treasury. See the letter reports of these officials on Pages 3030-3034 of 1950 U. S. Code Congressional Service.

The legislative history of the act, reported in 1950 U. S. Code Congressional Service, Pages 3022-3034, or Senate Report No. 2217, August 1, 1950; House Report No. 2339, June 26, 1950, does not support the claim of the Government or the decision of the courts below.

The decisions made no ruling on the January 1953 build-and-lease agreement. It ruled only on the basis of the January 1954 lease instrument.

The error of the decisions of the courts below is that the Post Office Department Financial Control Act of 1950, 64 Stat. 462, Sec. 8(1), does not authorize build-and-lease agreements for 20-year term.

If the 1950 Post Office Department Financial Control Act, 64 Stat. 462, Sec. 8(1), authorizes the same build-and-lease agreements for 20-year term as does the 1954 Post Office Department Property Act, 68 Stat. 523, Sec. 203(a)(1), then there is no purpose in the 1954 legislation.

If the 1950 Act allows build-and-lease agreements for 20-year term, then it can also be interpreted to permit build-and-lease-purchase agreements for 20-year term or any agreement or term of years.

The decisions of the courts below gave unlimited meaning to the words of Section 8(1), supra, " • • •, the Postmaster General may—(1) enter into such leases of real property as may be necessary in the conduct of the affairs of the Department on such terms as he may deem appropriate • • •" (• • • indicates eliminated wording). Reading out of the statute wording enacted into the statute is, of course, error in construction.

This is not normal construction of the words of the statute, but runaway interpretation limited only by the imagination of the Postmaster General and the Post Office Department.

POINT II

Build-and-lease agreements for 20-year term were first authorized under the July 1954 Post Office Department Property Act, 68 Stat. 523, Sec. 203(a)(1) expressly enacted for that purpose.

Before July 22, 1954 and particularly in January 1953 and January 1954 there was no statutory authority in the Postmaster General to enter into build-and-lease agreements for postal purposes for 20-year term.

Such agreements were first authorized to the Postmaster General under the July 1954 Post Office Property Act, 68 Stat. 523, Sec. 203(a)(1).

The legislative history of this statute supports this view. The Postmaster General in requesting this authority indicated build-and-lease agreements for 20-year term were not authorized at that time. The letter is set forth in part.

Page 2646, 1954 U. S. Code Congressional and Administrative News:

"Post Office Department
Office of the Postmaster General
Washington 25, D. C., July 17, 1953.

Hon. George A. Dondero
Chairman, Committee on Public Works
House of Representatives.

Dear Mr. Chairman:

Reference is made to your request for a report on H. R. 6342, a Bill to Amend the Public Buildings Act of 1949 to authorize * * * to extend the authority of the Postmaster General to lease quarters for Post Office purposes; and for other purposes.

The provisions contained in this measure are the result of extended study and discussion between representatives of the General Services Administration, the General Accounting Office, Bureau of the Budget and the Post Office Department. This measure has grown out of recommendations made from many viewpoints.

* * *

Title II of the bill relates to the Post Office Department.

The purpose and intent of this title is to authorize the Postmaster General to enter into two types of lease-holds (lease-purchase and term-lease agreements), not presently permissive, in the procurement of space to be used exclusively by the Post Office Department. (Emphasis added.)

* * *

Sincerely yours,

/s/ Arthur E. Summerfield
Postmaster General."

The courts below erred in holding that prior to July 1954 statute (Post Office Department Property Act), the Postmaster General had authority under the 1950 statute (Post Office Department Financial Control Act) to enter into build-and-lease agreements for 20-year term.

The construction given by the courts below was never claimed by the Postmaster General or other agency officials. The 1954 statute was enacted at the request of the Post Office Department to provide authorization to enter into build-and-lease agreements for 20-year term not previously authorized under any existing statute until first authorized by the July 1954 statute.

POINT III

Under the rule of *Chase v. United States*, 155 U. S. 489, the build-and-lease agreement of January 1953 and the January 1954 lease instrument for 20-year term made pursuant to the January 1953 agreement are void and invalid and violate the Public Contracts Act of 1906, 34 Stat. 255, 41 U. S. C. 11 (1958).

The Public Contracts Act of 1906, 41 U. S. C. 11 (1958) prohibits any government contract not authorized by law. Such contracts are void and invalid ab initio. See *Chase* v. *United States*, C. C. Ind. 1890, 44 Fed. 732, aff'd 155 U. S. 489.

It is only necessary to point out that under the above decision of the United States Supreme Court, under substantially similar facts as the subject case, the lease was voided after 16 years.

The rule was established in that case that the contract must be expressly authorized by the statute or be sanctioned by necessary implication. Otherwise, it was void ab initio and violated the requirement of the Public Contracts Act.

It was held that the statutory power to establish post offices necessarily implied authority to disestablish them. But it could not be construed impliedly to give authority to build and lease post offices for 20-year term.

Similarly, 64 Stat. 462 Sec. 8(1), Post Office Department Financial Control Act 1950, could not be construed to authorize build-and-lease agreements for 20-year term because the statute did not expressly authorize it and it is not necessarily implicit in the wording of the statute.

The courts below were in error in departing from the well-established authority of *Chase* v. *United States, supra.*

POINT IV

Under the rule of *Guerini Stone Co.* v. *P. J. Carlin Co.*, 240 U. S. 264, the build-and-lease agreement of January 1953 and the lease instrument of January 1954 were one contract and the courts below were in error in treating them as separate and independent agreements.

The 1953 build-and-lease agreement stipulated the specifications of the structure to be erected and the rental, duration of the term, terms and conditions of the lease were stated in the agreement and the standard form of Post Office Department lease attached to the agreement.

The agreement reads in part:

"The undersigned hereby agrees to lease the premises described below for a term of twenty (20) years from September 1, 1953, or date thereafter of completion of building or any contemplated improvement, * * * and subject to the provisions of the form of lease used by the Post Office Department, and the Information for Proponents, specimens of which are annexed hereto, and which have been carefully

read by the undersigned, except that clauses A and B of Par. 10 shall be eliminated": (there follows a description of the dimensions of the building and specifications of the yard and driveway which were to be erected on the vacant parcel and some additional requirements to be furnished under the lease). It is executed by Cohanan Realty Corp. the original contractor and lessor, and accepted by the Post Office Department.

The leasing agreement is part of the construction agreement. In fact, they are one contract and cannot be separated.

It is evident that without the construction of a new permanent-type structure according to Post Office Department specifications and requirements, there cannot be a leasing agreement on completion.

The 1954 lease instrument states in Provision 13 that it is made pursuant to the 1953 construction and leasing agreement.

The 1954 lease instrument recites the same terms and conditions as the standard form Post Office Department lease attached to the 1953 construction and leasing agreement and by the express terms of that contract is "annexed" thereto. The 1954 lease instrument is a shadow agreement and alter ego made "pursuant to" the 1953 agreement.

Under the well-established doctrine of reference, annexation and merger, the 1953 and 1954 agreement are one distinct contract which cannot be separated for any purpose of construction. See *Guerini Stone Co.* v. *P. J. Carlin Co.*, 240 U. S. 264; *Hill and Combs* v. *First National Bank of San Angelo, Texas,* 139 F. 2d 740, 742 (CCA 5, 1944) citing *Guerini Stone Co.* v. *P. J. Carlin Co., supra; Shanks* v. *Wilson,* 86 F. Supp. 789 (D. C. W. Va. 1949); *Raeuber* v. *Central Nat. Bank,* 112 F. Supp. 865 (D. C. Ohio 1953), page 868:

"It is fundamental that a contract may refer to other writings and by adoption make them a part of the contract. 17 C. J. S., Contracts, Sec. 299, P. 716; 12 Am. Jur. 781. Where extrinsic writings are adopted they become a part of the contract or other written instrument by reference. Physical integration of the writings is not required."

The contract is one entire whole and the separation into a leasing and construction agreement for the purpose of supposed compliance with any statute, authorizing the Postmaster General to enter into leasing agreements for space (already in existence) would be an illegal evasion of the Public Contracts Act of 1906 prohibiting contracts not authorized by law.

In January 1953 and January 1954 there was no law in existence to comply with the Public Contracts Act of 1906, 41 U. S. C. 11 (1958). Construction and leasing agreements were first authorized by July 22, 1954 under the Post Office Department Property Act of 1954, 68 Stat. 523, Sec. 203(a)(1).

CONCLUSION

1. The question should be reviewed by this Court. It has never been decided by this Court whether the 1950 Post Office Department Financial Control Act, 64 Stat. 462, Sec. 8(1) authorizes the Postmaster General to enter into an agreement with the owner of real property for such owner to build a post office on the property and on completion to lease the building to the Post Office Department for 20-year term.

2. The question whether the courts below departed from the rule of *Chase* v. *United States*, 155 U. S. 489, in violation of judicial principle should be reviewed by this Court.

The decision of this Court in *Chase* v. *United States, supra,* a case substantially similar to the subject case, indicates that the Court of Appeals and the District Court below were in error in holding that the 1950 statute, Post Office Department Financial Control Act, 64 Stat. 462, Sec. 8(1), authorized build-and-lease agreements for 20-year term where the statute did not expressly or by necessary implication authorize such agreements.

3. The question whether the courts below departed from the rule of *Guerini Stone Co.* v. *P. J. Carlin Co.,* 240 U. S. 264, in violation of judicial principle should be reviewed by this Court. The decision of this Court in *Guerini Stone Co.* v. *P. J. Carlin Co., supra,* indicates that the Court of Appeals and the District Court below were in error in treating the January 1953 build-and-lease agreement for 20-year term and the January 1954 20-year lease instrument as separate and independent contracts.

For the foregoing reasons, petitioners respectfully pray that a Writ of Certiorari be granted and that this Honorable Court summarily reverse the courts below.

Respectfully submitted,

LOUIS GRANICK
Attorney for Petitioners
2849 West 25th Street
Brooklyn 24, New York

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 283—October Term, 1960

(Argued February 20, 1961 Decided March 23, 1961)

Docket No. 26704

MAX MILLET and DORA MILLET,

Plaintiffs-Appellants,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Before:

HINCKS and MOORE, *Circuit Judges,* and
BRENNAN, *District Judge.**

Appeal from an order of the United States District Court for the Eastern District of New York, John R. Bartels, *Judge,* 189 F. Supp. 88, dismissing plaintiffs' complaint for failure to state a claim. Affirmed.

* Sitting by designation.

LOUIS GRANICK, Brooklyn, N. Y. *for Plaintiffs-Appellants,*

—37a—

RICHARD S. HARRELL, Asst. U. S. Atty., Eastern District of New York, Brooklyn, N. Y. (Cornelius W. Wickersham, Jr., U. S. Atty., E. D. N. Y. on the brief), *for Defendant-Appellee.*

PER CURIAM:

Affirmed on the opinion below.

UNITED STATES COURT OF APPEALS

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of March one thousand nine hundred and sixty-one.

Present:

Hon. Carroll C. Hincks,
Hon. Leonard P. Moore,
Circuit Judge.

Hon. Stephen W. Brennan,
District Judge.

Max Millet and Dora Millet,
Plaintiffs-Appellants,

—v.—

United States of America,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

This cause come on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed, that the judgment of the said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

United States Court of Appeals
Second Circuit
Filed March 23, 1961

A. DANIEL FUSARO, *Clerk*